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Supreme Court, U.S.
FILED
07-820 OCT 15 2007
OFFICE OF THE CLERK

No.

In the

Supreme Court of the United States

Francisco C. Zamora

Petitioner,

v.

Peter D. Keisler, Acting Attorney General of the United States

Respondent.

On Petition for Writ of Certiorari To The United States Court of Appeals For the Seventh Circuit

SUPPLEMENTAL APPENDIX

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U.S. Department of Justice
Decision of the Board of Immigration Appeals
Executive Office for Immigration Review
Falls Church, Virginia 22041

File: A38 884 655 - Chicago
Date: May 25, 2006

In re: FRANCISCO C. ZAMORA
IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Royal F. Berg, Esquire

ON BEHALF OF DHS:
Christine Young
Assistant Chief Counsel

CHARGE:

Notice: Sec. 212(a)(2)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(2)(A)(i)(I)]-Crime involving moral turpitude

& 212(a)(2)(A)(i)(II), I&N Act [8 U.S.C. § 1182(a)(2)(A)(i)(II)] - Controlled substance violation

APPLICATION: Termination; waiver of inadmissibility

AMENDED DECISION[1]

The Board previously issued a decision in this case on May 16, 2006. We reconsider that decision on our motion. See 8 C.F.R, § 1003.2(a) (2006). We vacate our prior order, reinstate the appeal, and issue the following decision which dismisses the appeal.

The respondent has appealed the April 5 , 2005, decision of the Immigration Judge which denied his motion for the Immigration Judge to recuse herself from the case, to suppress evidence, and to terminate the proceedings; found him removable as charged; denied his application for a waiver of inadmissibility under section 212(c) ofthe Immigration and Nationality Act, 8 U.S.C. § 1182(c); and ordered him removed to Mexico. The Department of Homeland Security (DHS, formerly Immigration and Naturalization Service (INS)) urges us to affirm the decision of the Immigration Judge. The appeal will be dismissed. The request for oral argument is denied.

On March 25, 2005, the Immigration Judge issued a detailed decision denying the respondent's motion, and she incorporated this decision into the final order issued on April 5, 2005. On review, we agree with the findings of the Immigration Judge, and adopt and affirm her decision. *See Matter of Burbano*, 20 I&N Dec. 872, 874 (BIA 1994) (noting that adoption or affirmance of a decision of an Immigration Judge, in whole or in part, is "simply a statement that the Board's conclusions upon review of the record coincide with those which the Immigration Judge articulated in his or her decision"). We add the following in response to the arguments raised on appeal.

The respondent argues that the Immigration Judge did not conduct a fair hearing. He asserts that she should have recused herself from the proceedings because she was the District Counsel of the former INS at the time the respondent's proceedings commenced. As discussed in her March 25, 2005, decision, the Immigration Judge had never been directly involved with the respondent's case, and we agree it was fair for her to proceed with this case. Similarly, we agree with the Immigration Judge that her husband's employment as District Counsel of DHS did not provide cause for her to recuse herself from this case. Furthermore, our review ofthe record indicates that the Immigration Judge did actually conduct the hearing in a fair and impartial manner.

On appeal, the respondent specifically challenges the Immigration Judge's decision to admit a "rap sheet" issued by the Federal Bureau of Investigation (FBI) into the record (see Exh. 5). The Immigration Judge acted within her discretion to accept the rap sheet into evidence even though it was not submitted before the hearing in question. Further, the proceedings continued beyond that hearing date, and the Immigration Judge addressed the respondent's objections to the rap sheet in her March 25, 2005, decision. The respondent argues that the Immigration Judge proceeded unfairly in ordering him to appear for fingerprints during the proceedings, which in turn gave rise to the rap sheet. We see nothing fundamentally unfair about the timing of the Immigration Judge's request for the respondent to submit fingerprints. The respondent also challenges the Immigration Judge's failure to require that the DHS inspector who placed the respondent in proceedings appear at the hearing, even though she

initially indicated that she would do so. We find no error here as the documentary evidence of record is sufficient to establish the respondent's inadmissibility to the United States (see Exhs. 2-5).

As found by the Immigration Judge, the certified conviction records and rap sheet establish the respondent's removability as charged. See I.J. Dec., March 25, 2005, at 2-4, 7-8. The respondent's challenges to these documents on appeal are not convincing.

The respondent also challenges the Immigration Judge's decision to deny his application for a section 212(c) waiver because his 1994 conviction for possession of a controlled substance was based on a finding of guilty, rather than a plea (see Exh. 3). The respondent initially argues that it is not clear from the conviction records that no plea was entered. The judgment for this conviction reads "FNDG GUILTY." (Id.). We agree with the immigration Judge that this indicates that no plea was entered in this case. In any event, the respondent had the burden of proof to present evidence of a plea. See 8 C.F.R. § 1240.8(d).

The respondent alternatively argues that even if he did not plead guilty, he should be eligible for section 212(c) relief which was repealed by the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). As found by the Immigration Judge, there is nothing in *INS v. St. Cyr*, 533 U.S. 289 (2001), which indicates that its reasoning applies to aliens who failed to enter a plea of guilty or nolo contendere. The respondent is therefore ineligible for section 212(c) of the Act. *See also Montenegro v. Ashcroft*, 355 F.3d 1035, 1037 (7th Cir. 2004); *Armendariz-Montoya v. Sonchick*, 291 F.3d 1116 (9th Cir. 2002); 8 C.F.R. §

1212.3(h) (2006); *cf. Ponnapula v. Ashcroft*, 373 F.3d 480 (3rd Cir. 2004). The respondent argues on appeal that it violates his rights to bar him from 212(c) because he could have been wrongly convicted. We are not convinced by this speculative argument, and find that the respondent does not fall under the exception set out in *INS v. St. Cyr, supra.*

On appeal, the respondent also argues that his removal amounts to cruel and unusual punishment in violation of the Eighth Amendment. This argument is without merit as removal proceedings are not criminal and do not constitute punishment. *See Flores-Leon v. INS*, 272 F.3d 433, 440 (7th Cir. 2001).

ORDER: The Board's decisions dated May 16, 2006, and May 24, 2006, are vacated.

FURTHER ORDER: The respondent's appeal is dismissed.

FOR THE BOARD

[1] To modify our prior decision, we vacate our order dated May 24, 2006, on our own motion. See 8 C.F.R. § 1003.2(a). Our amended decision is identical to the vacated order with the exception of language now found in the second full paragraph on page three of this decision.